

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

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	:
BRUCE BARCLAY,	:
Plaintiff,	:
	:
vs.	: Case No. 1:14-cv-1200
	:
	:
TRANS UNION, LLC., et al.,	:
Defendants.	:
	:
-----	:

HEARING ON MOTIONS

March 13, 2015

Before: John F. Anderson, Mag. Judge

APPEARANCES:

Kristi C. Kelly, Counsel for the Plaintiff

Mary C. Zinsner and Jennifer L. Swize,  
Counsel for Defendant Trans Union

1           NOTE: The case is called to be heard at 10:11 a.m.  
2 as follows:

3           THE CLERK: Barclay versus Trans Union, LLC, et al.,  
4 civil action 14-1200-cv.

5           THE COURT: Well, we --

6           MS. KELLY: Good morning, Judge -- oh, sorry.

7           THE COURT: Plaintiffs on that side. Defendants on  
8 that side. Thank you.

9           MS. KELLY: Kristi Kelly for the plaintiff.

10          THE COURT: Thank you, Ms. Kelly.

11          And who is going to argue on behalf of the defendant?

12          MS. ZINSNER: Good morning, Your Honor. Mary Zinsner  
13 for the defendant.

14          It's my pleasure to introduce to the Court Ms.  
15 Jennifer Swize, who is a partner with the firm of Jones Day,  
16 who has been asked to step in and address the Court's questions  
17 regarding responsibility for this case.

18          THE COURT: Has she been admitted yet?

19          MS. ZINSNER: Your Honor, that's the one matter I  
20 wanted bring to your attention. Her pro hac vice application  
21 was submitted last evening. And I would like to move orally to  
22 have --

23          THE COURT: Has she paid the fees? I mean, I --  
24 yeah. If someone wants to come in and argue in this case, and  
25 this motion wasn't set yesterday, it seems like they could have

1 gotten their papers together and got them filed during normal  
2 business hours and presented whatever information it was that  
3 needed to be presented to the Court for the Court to make that  
4 decision in the normal course of business, Ms. Zinsner.

5 MS. ZINSNER: I understand, Your Honor.

6 THE COURT: Why wasn't it filed and the fee -- has  
7 the fee been paid?

8 MS. ZINSNER: I believe it was filed electronically  
9 and the fee was paid. I can't --

10 THE COURT: I don't know either. I mean --

11 MS. ZINSNER: Yes, yes, Your Honor, the fee was paid.

12 Your Honor, I apologize. I know there was some  
13 confusion as to who would be handling this motion yesterday.  
14 And I advised them that I would be moving orally today that  
15 that motion for pro hac vice be granted.

16 Ms. Swize is a member of the Maryland Bar, as well as  
17 the D.C. Bar. She is a member of the United States Supreme  
18 Court, as well as multiple Courts of Appeals, and the District  
19 Court of Maryland and D.C. She has been admitted several times  
20 pro hac vice to this court in various cases.

21 It's our intent today for me to address some  
22 questions the Court has --

23 THE COURT: Well, only one lawyer is -- I mean, I'll  
24 let one lawyer argue the motion to stay and one lawyer argue  
25 the motion for reconsideration, but I'm not going to have two

1 lawyers arguing one motion.

2 MS. ZINSNER: That's fine, Your Honor. Your --

3 THE COURT: So, I mean, there is no tag-teaming  
4 around here.

5 MS. ZINSNER: I understand. The Court's order when I  
6 read it addressed counsel for defendants to address the number  
7 of cases in this court and the awareness of the particular  
8 rule. And I wanted to address that Court's question as it  
9 relates to our firm because there is no question that I believe  
10 there has been a lapse of responsibility on our part as local  
11 counsel.

12 Your Honor, given my long practice in this court, I  
13 feel personally responsible for the cases that our firm handles  
14 in this court even if I'm not associated and don't have my name  
15 on those pleadings. And I recognize the shortfall on our part,  
16 and I apologize to the Court for that.

17 And even though the associate working on the case  
18 both at Troutman Sanders and Jones Day were not aware of the  
19 particular provision in the Rule 16(b) notice, I feel that we  
20 were on notice of it, and it was incumbent on us to alert the  
21 Jones Day lawyers to this particular rule.

22 It's the question I am most frequently asked as a  
23 practitioner in the Eastern District of Virginia as --

24 THE COURT: Well, it was a Court order. It wasn't a  
25 rule. It was in a Court order.

1 MS. ZINSNER: Agreed, Your Honor. Agreed. And a  
2 quick call or an e-mail to somebody who practiced frequently in  
3 this court would have resolved the problem.

4 So what we have here is a confluence of circumstances  
5 that should have occurred but didn't occur. There was a  
6 snowstorm. What happened, they should have been --

7 THE COURT: No, no. A snowstorm in Dallas on  
8 Wednesday is no excuse.

9 MS. ZINSNER: Your Honor --

10 THE COURT: And, you know, Ms. Zinsner, I don't  
11 understand how you can say that someone who starts having a  
12 snowstorm in Dallas on Wednesday afternoon can cause a delay in  
13 filing a pleading on Wednesday.

14 MS. ZINSNER: That wasn't -- that was one of the  
15 parts of the confluence of circumstances that led to this  
16 situation. There was also the emphasis on attempting to  
17 resolve this discovery dispute.

18 There are many cases that Experian is a defendant in  
19 in this court, and their mantra, as is mine, is to resolve  
20 these cases as efficiently and quickly as possible, and resolve  
21 discovery disputes as well. Because they realize the time that  
22 these disputes take and the costs on the Court and counsel. So  
23 that was going on.

24 But again, Your Honor, I recognize fully that we were  
25 aware of the deadline and should have alerted Jones Day. There

1 should have been a call to chambers Wednesday afternoon that we  
2 realized that the deadline was about to pass and we had not  
3 filed our opposition brief. There should have been some type  
4 of explanation to the Court, some type of request given the  
5 impending weather and the closure of the court the next day as  
6 to some -- whether the Court might consider continuing the  
7 hearing, et cetera.

8 Your Honor, there are three divisions of this court,  
9 there are different rules in each division, and it's our  
10 responsibility at Troutman Sanders to ensure that when we have  
11 cases filed in these different divisions, that we're aware and  
12 tell our co-counsel of the particular rules of the case.

13 We are open 24/7 to answer the questions of our  
14 colleagues, and I truly am sorry for this situation that the  
15 parties are in presently before the Court.

16 And I would ask the Court's accommodation to allow  
17 Ms. Swize, who is here at the client's request, to address the  
18 situation before the Court.

19 THE COURT: Okay. Well -- okay. I will assume the  
20 paperwork will be processed in the normal course of business,  
21 and your request will be granted.

22 So I'll allow you to argue in front of the Court this  
23 morning.

24 MS. SWIZE: Thank you, Your Honor.

25 THE COURT: Two things you need to address.

1 MS. SWIZE: Yes.

2 THE COURT: One is, this was an order of the Court,  
3 not a rule of bankruptcy procedure or other kinds of rules of  
4 court. And your pleadings don't indicate anything about it  
5 being a violation of a Court order and seeking relief from a  
6 Court order that set that schedule.

7 And the other is, I need to have you directly address  
8 how Jones Day can take the position in this case that Jones  
9 Day, representing Experian in this case, did not know when the  
10 opposition was due.

11 MS. SWIZE: Yes, Your Honor, I will address both of  
12 those points. I apologize for the inconvenience and the  
13 missteps with my pro hac vice application, and I do appreciate  
14 you letting me represent the firm and the client before you  
15 this morning. So I appreciate the accommodation.

16 And I would like to -- I am going to address both of  
17 those points. I understand they were directed in your order.  
18 I would like to be very clear from the beginning to say that we  
19 take responsibility for this as a firm. We made a mistake. We  
20 filed out of time and did not comply with the Court order, and  
21 we are responsible for that.

22 The Court's order noted, and you've noted this  
23 morning, that Jones Day handles a significant number of cases  
24 in this district, in this division. We pride ourselves on  
25 that. We value our representation before the Court, and we

1 strive for perfection.

2 If there is any good news that could come out of  
3 this, it is that this is an aberration. This is a mistake.  
4 And this was a case that wasn't handled the way it should have  
5 been. But we do regularly strive to meet and comply with all  
6 of the court deadlines.

7 Let me turn to what happened here. In this case the  
8 lawyer that was handling the matter was acting diligently and  
9 received the motion. He has handled prior Experian cases in  
10 different divisions, including in this division, but he has  
11 been able to either successfully avoid discovery disputes or  
12 they settled. This was the first time he was faced with a  
13 nondispositive motion.

14 And what I'm doing right now, Your Honor, I just want  
15 to explain the circumstances --

16 THE COURT: It's the firm that represents this  
17 client, not an individual lawyer. And it's the firm's  
18 responsibility to make sure that anyone that it assigns a task  
19 on a case in this court, that he or she knows what they need to  
20 do and when they need to do it by.

21 So the idea -- I mean -- and that's why I said, I  
22 want to know about Jones Day. I don't care necessarily about  
23 an individual, an attorney, but it is Jones Day's  
24 responsibility to see that things get done, that rules are  
25 followed, and that orders are complied with.



1           And that's the issue that we've got here today, is  
2 whether Jones Day complied with an order of this Court.

3           MS. SWIZE: Your Honor, I understand that. And that  
4 is why the firm has sent me because I am speaking on behalf of  
5 the firm. And we understand --

6           THE COURT: And they decided that last night, is that  
7 right?

8           MS. SWIZE: It was an evolving decision in  
9 conjunction with the client. And again, I do apologize for the  
10 lateness of this appearance. We did consult with plaintiff's  
11 counsel this morning to make sure she didn't have an objection  
12 so that we weren't inconveniencing her. But I understand that  
13 doesn't address the issues before the Court and from your  
14 perspective.

15           So again, I do appreciate the accommodation. And I  
16 am speaking on behalf of the firm.

17           We practice regularly in this court. And, yes, just  
18 like Ms. Zinsner noted for Troutman, we as a firm and as many  
19 individuals in my office and elsewhere know the rules of this  
20 court and know the schedule for nondispositive motions when  
21 they were in Rule 16(b) scheduling orders.

22           There was -- when I investigated this to see what  
23 happened, it reminds me of those conversations where I have had  
24 where two people are talking, and they are having the same  
25 dialog, but in retrospect they realize they're having different

1 conversations.

2           The lawyer in this case, who would have been the  
3 front line person handling the response, was under the  
4 impression that there was not a schedule. Again, this was the  
5 first time he handled a nondispositive motion. He was trying  
6 to be diligent so that he could determine whether there was a  
7 schedule. He didn't contact Troutman. Troutman didn't contact  
8 us. We take responsibility for that.

9           THE COURT: Well, the representation in the paper is  
10 that the lawyer read the initial order that came out. That  
11 initial order says that there needed to be a joint discovery  
12 plan filed, and that there was going to be a conference in  
13 front of a magistrate judge.

14           That order that came out of that Rule 16 conference  
15 is in the docket sheet, and was entered prior to that pro hac  
16 admission of that attorney. And I don't think there is  
17 anything unclear about the Rule 16 order.

18           And the idea -- I mean, you know, it's clear from  
19 what at least was indicated in the papers, that the attorney  
20 was aware of that scheduling order that initially came out that  
21 directly referenced the need for a joint discovery plan and the  
22 time in which the magistrate judge would be having a conference  
23 after that.

24           And so, it wouldn't have been difficult to look to  
25 see three docket entries down that there was a Rule 16

1 scheduling order entered in this case.

2 MS. SWIZE: I completely agree, Your Honor,  
3 absolutely. In many ways we were on notice of the deadline in  
4 the Rule 16(b) schedule, both through the earlier order on the  
5 docket because there wasn't a deadline specified in the Local  
6 Rules. And I am not trying -- at this point I really am not  
7 trying to excuse that or justify that. I just want to lay out  
8 the scenario to give you the broader context and what happened.  
9 Because it is absolutely true that the lawyer did not know  
10 there was a deadline.

11 Given that understanding that he had, which was  
12 wrong, he then proceeded to independently identify a reasonable  
13 time to file.

14 THE COURT: How reasonable is that? That a lawyer  
15 didn't realize that there wasn't a deadline for filing an  
16 opposition? Was it -- I mean, did he not know that there was  
17 going to be a hearing? Obviously he knew that because the  
18 notice and the motion and the memorandum indicated that it was  
19 going to be heard on a Friday at 10 o'clock.

20 MS. SWIZE: Yes, Your Honor.

21 THE COURT: And the lawyer figured that they could  
22 file an opposition at any point in time?

23 MS. SWIZE: No, Your Honor. He knew about the  
24 hearing. And not knowing of a deadline, he then assessed when  
25 would -- having received the motion late on Thursday, when

1 would be a reasonable time to respond. And it was his goal  
2 coincidentally to file by Wednesday.

3 If some of these events hadn't transpired, we may not  
4 be here, but we also may not have corrected the problem. But  
5 we're here. And he had the goal and the intent to file by  
6 Wednesday so that the Court and Mr. Barclay's counsel would  
7 have enough time to read our opposition, file a reply, appear  
8 on Friday. And that was his intent, and he was operating in  
9 that system.

10 Given that, we certainly did not confirm that he  
11 understood that that Wednesday was not simply a goal, but that  
12 it was an actual deadline, that it was a 5 p.m. deadline. Our  
13 conversations with Troutman didn't confirm that either. But  
14 there were these -- given his intent to file by Wednesday, it  
15 was consistent with our understanding of what should have  
16 happened.

17 As we got closer to Wednesday and throughout that  
18 week, the lawyer was trying to resolve the issues. In fact, he  
19 did successfully resolve one of the issues.

20 We all know this court moves at a fast pace, and it's  
21 much better to avoid being here on Friday mornings and resolve  
22 things with the parties so that people have the discovery and  
23 the documents they need so we can go to trial. And he was  
24 working hard to do that, and he did in fact resolve one issue.

25 There was the one outstanding issue that he continued

1 to work on. He determined it wasn't going to be resolved and  
2 he needed to file an opposition. He had been preparing it. He  
3 also needed some support in a declaration. He started with one  
4 individual. It became clear that that individual was not the  
5 right person. And then he identified the second individual.  
6 And this is where the confluence of circumstances -- and again,  
7 I'm not offering this as any sort of justification, but just to  
8 explain the narrative.

9 That when the snowstorm happened, our declarant said  
10 she was not going to be able to complete this in a timely  
11 fashion and, therefore, it would be better to file on Thursday.

12 THE COURT: Well, let's go back to what you said in  
13 your papers.

14 MS. SWIZE: Okay.

15 THE COURT: So that I can understand what the facts  
16 are. Page 3 you indicate that the parties have -- and this is  
17 discussion, what you're talking about, that they are trying to  
18 resolve the matter. And obviously there has to be a good faith  
19 consultation before a motion gets filed.

20 MS. SWIZE: Yes.

21 THE COURT: So if Experian had any real desire to try  
22 and resolve this motion, it had the opportunity to do that  
23 before it got filed. The issues were raised, lines were drawn,  
24 and the motion got filed.

25 So the opportunity for a good faith consultation

1 preceded the Thursday on which this motion was filed. I  
2 understand it may have gone on following that too. But once a  
3 motion gets filed, you know, the idea isn't, I really have to  
4 now pay attention to the issues. It's either, I've got to get  
5 this resolved, or I need to file an opposition.

6 And, you know, if you've got to go on two different  
7 tracks, you've got to go on two different tracks.

8 MS. SWIZE: Absolutely.

9 THE COURT: If you're only going to go on one track,  
10 the tract you go on is getting an opposition filed in a timely  
11 manner. Not, I'm going to work it out with the hope that, you  
12 know, I'm not going to need to file an opposition.

13 So you indicate in the brief here that counsel for  
14 Experian continued to investigate whether a compromise could be  
15 reached on that second issue. On Wednesday evening counsel  
16 recognized that the parties would not be able to reconcile  
17 their differences. Once his attention was no longer focussed  
18 on resolving the motion, he realized he would not be able to  
19 file Experian's response on Wednesday.

20 That sounds to me like there wasn't really any work  
21 being done on the opposition until his attention was no longer  
22 focussed on trying to resolve the dispute.

23 So you didn't start doing the opposition until  
24 Wednesday.

25 MS. SWIZE: Your Honor, there was effort I know to

1 start the declaration and the opposition. I think there was --  
2 it's not so neat to sort of say that one -- there were first  
3 efforts to try to resolve it and then things switched into  
4 motion mode or opposition mode. They were different -- they  
5 were being attempted simultaneously. There was a shift in  
6 emphasis when our lawyer identified that we were going to have  
7 to file an opposition. And that had been started earlier, and  
8 we identified an individual who turned out wasn't going to be  
9 the right person to speak to the issues in the motion to  
10 compel. And so, we switched to Ms. Hughes, and that's when the  
11 snow storm came.

12           Again, I'm not trying to say that any of these  
13 reasons explain or justify the initial failure to identify the  
14 proper date or our failure to make sure he understood. But  
15 given his understanding that Wednesday would be an appropriate  
16 time, then he continued, everything was on track when the snow  
17 storm came, when the declaration had to come from a different  
18 individual, when we weren't aware that filing Thursday morning,  
19 albeit later than Wednesday, was going to be out of time --

20           THE COURT: Well, it wasn't even Thursday morning.  
21 It was Thursday afternoon.

22           MS. SWIZE: Thursday afternoon, yes, Your Honor.

23           THE COURT: And there was no indication in what was  
24 filed on Thursday as to any reasons. It was just, here is my  
25 opposition.

1 MS. SWIZE: And hindsight is 20/20, and we should  
2 have had it beforehand. We should have alerted the Court. We  
3 actually probably should have stopped the filing, contacted the  
4 other side to see if they had any opposition to our time,  
5 contacted the Court, conferred with Troutman, made sure we  
6 understood what steps.

7 Our intent was to come to court on Friday and  
8 apologize. That clearly wasn't the right approach. We should  
9 have taken proactive steps beforehand. But that was our  
10 intent, to address it first thing with the Court on Friday.

11 THE COURT: Why wouldn't -- if that was your -- when  
12 did you form that intent? After you got their opposition --  
13 after you got their reply saying, you know, this was late?

14 MS. SWIZE: No. It was when we filed the opposition  
15 -- excuse me.

16 THE COURT: So you filed it knowing it was late?

17 MS. SWIZE: There was some -- there were  
18 communications between the two law firms that did not catch  
19 that it was a late filing. And it went ahead and there was the  
20 instantaneous decision, let's get this on file, and we will  
21 handle this through an apology to the Court.

22 And I recognize, Mr. Zinsner recognizes, Mr. Clark,  
23 Mr. Jacobi recognizes that was not the proper way to handle it,  
24 absolutely. We should have taken our time, taken the few  
25 minutes it would have taken to contact the other side, to



1 contact chambers, to do our motion to enlarge for time at that  
2 point, absolutely, Your Honor.

3 I would like to emphasize that he was trying to be  
4 cooperative. We have met all of the deadlines in this case. I  
5 understand this is not considered in the broader context of our  
6 representation before this Court, but we do take these rules  
7 seriously. It is a schedule that differs from the other  
8 divisions and differs from other courts.

9 Again, I am not justifying that -- that's the first  
10 thing I do, that is the first thing everybody should do,  
11 understand what the rules are and understand what the deadlines  
12 are.

13 In the context of the standard, inherently the  
14 standard for excusable neglect understands --

15 THE COURT: Why does that standard apply to failing  
16 to comply with a Court order?

17 MS. SWIZE: Your Honor, I would submit that it's the  
18 same as good cause. And under either standard --

19 THE COURT: You think good cause is the same thing as  
20 excusable neglect?

21 MS. SWIZE: Yes, Your Honor, and I believe the case  
22 law -- there are cases that discuss those standards  
23 interchangeably. And it's not -- the premise is that something  
24 wrong happened. And so, at this point what is the consequence  
25 of that? And is the consequence striking our pleading or

1 ignoring our pleading?

2 And given the good faith effort, we did resolve one  
3 issue, we were trying to resolve one issue -- again, I'm not  
4 saying that any of these reasons would ever be, you know --  
5 that we should practice this way, certainly not. But we were  
6 acting in good faith, actually being attentive to the case.

7 And the case law focuses on inattentiveness,  
8 misconduct. The record is clear that we were attentive to the  
9 case. We have a cordial relationship with the other side. We  
10 were trying to address this.

11 This is a significant discovery from our client.  
12 Certainly we're not -- we were taking it seriously. We missed  
13 a deadline, but that isn't a reflection of how seriously we  
14 took this and our intent to oppose the motion to compel on the  
15 merits.

16 And that's why we're here this morning, to ask the  
17 Court to consider the motion to compel on the merits.

18 THE COURT: Well, one of the cases you cited, the  
19 Thompson versus du Pont case, talks about excusable neglect and  
20 states that inadvertence, ignorance of the rules, or mistakes  
21 construing the rules do not usually constitute excusable  
22 neglect.

23 Isn't that what we have here?

24 MS. SWIZE: Your Honor, there is inherently in the  
25 standard that there is going to be -- there are going to be

1 times when there was a mistake, a miscomprehension of the  
2 rules. And that's why the Supreme Court's test in Pioneer and  
3 as it's applied in Symbionics and Thompson and all of the other  
4 cases evaluates the totality of the circumstances.

5 It does say usually. Obviously, it's not anything  
6 that should be done in the common course or, you know,  
7 litigation would be mayhem.

8 But in this particular circumstance, with the lawyer  
9 trying very hard to cooperate, attentive to the case  
10 actually -- he wasn't sitting on the issue. He was trying to  
11 resolve it. He was getting the support he needed for the  
12 paper. It was, it was less than one day late. Not that --  
13 again, not that any delay was okay --

14 THE COURT: Well, you know, if it was less than one  
15 day late and it was two weeks before the hearing, that's one  
16 thing. But filing something at 2 o'clock in the afternoon for  
17 something that is going to be heard at 10 o'clock the next  
18 morning -- and, you know, part of this is giving the other side  
19 notice, but the other part is giving the Court notice and the  
20 opportunity to review something.

21 And honestly, when I didn't get the opposition on  
22 Wednesday afternoon, I checked my computer again Wednesday  
23 night at 11 o'clock, saw that nothing had been filed, checked  
24 it again on Thursday morning and saw nothing had been filed,  
25 and I decided this case, there wasn't going to be an opposition

1 because, you know, it didn't get filed.

2 And, you know, you're right, this is a significant  
3 motion, and I understood that. And that's why we have time  
4 tables for people to file pleadings, so that significant issues  
5 can get looked at, considered by the Court, considered by the  
6 parties, and decided in a timely manner.

7 MS. SWIZE: Again, Your Honor, I of course completely  
8 agree, and I apologize for the time not only last week but also  
9 this week that this has cussed, absolutely.

10 It was our intent -- and again, ironically, he  
11 identified Wednesday as the appropriate day that he was aiming  
12 for. But with additional events that happened and not being  
13 aware that that was the deadline, it did spill over into  
14 Thursday. There was the snow storm here. There was the snow  
15 storm in Dallas.

16 And I completely understand the Court's position.  
17 And again, I apologize that we didn't get it to you at a  
18 sufficient time, and particularly that you were attentive to it  
19 and looking to see if something had come in.

20 THE COURT: Tell me how even -- let's just for the  
21 sake of this part of our discussion, assume excusable neglect  
22 would be the standard that should be applied for failing to  
23 comply with a Court order. How do you see the facts of this  
24 case falling into the excusable neglect exception.

25 MS. SWIZE: Your Honor, the way I read the cases is

1 that there is a divide between attentiveness and  
2 inattentiveness. And the record of this case, both this  
3 particular issue and throughout the history of this case, has  
4 been attention. The parties have been cooperative. We have  
5 engaged in discovery discussions. We have produced discovery.

6 And then on this very issue, there were discussions.  
7 The lawyer attempted to resolve both of the issues that were  
8 brought in the motion to compel and successfully resolved one.  
9 There was attention to the case. There was not attention to  
10 the deadline, and we acknowledge that. But there was an  
11 attentiveness --

12 THE COURT: But that's what all these cases are  
13 dealing with. It's not that the people didn't file a notice of  
14 appeal. They filed a notice of appeal late.

15 Or it's not that they didn't file a claim. They  
16 filed it late.

17 So, attentiveness -- I mean, in all of the cases that  
18 you're relying on, people did something, they just did it late.  
19 So it's not like they didn't do it at all. They just weren't  
20 paying attention to the time timetable in which it was going to  
21 be done.

22 So the attentiveness part I don't understand.

23 MS. SWIZE: Your Honor, I will address that. So, you  
24 know, there are -- each one of these cases has there own set of  
25 facts. For the notices of appeal, those are jurisdictional

1 issues. Some of those were filed very late and out of time.  
2 That's where the fact that the one-day delay comes into play.

3 In their response to our motion, plaintiff  
4 acknowledged that this has not had an impact on the judicial  
5 proceedings, and didn't have any argument that there was actual  
6 prejudice. There are some other arguments about prejudice in  
7 terms of discovery generally, but not related to this issue.

8 And so, there are cases that, the Batton case for  
9 one, where there was a one-day delay. And in the context of  
10 the case and seeing what else was going on, this isn't the sort  
11 of case where the lawyer just sort of glibly said, I'm not good  
12 at math, or I'm going to completely rely on a calendaring error  
13 from my computer system. He actually took steps to try to  
14 identify a deadline.

15 Granted, he did not take the step to identify the  
16 order. And as you've pointed out, it's referenced in one of  
17 the orders that he did consult.

18 THE COURT: But if you put a date into a computer and  
19 it calculates it wrong, you're still trying, you're just not  
20 doing a very good job at it.

21 I mean, the attentiveness part of it -- go ahead.

22 MS. SWIZE: And I don't want to split hairs, Your  
23 Honor, but I do think it's important to evaluate in the full  
24 circumstance of what was going on that he was -- he was  
25 intending to file at a time that would not have inconvenienced

1 everybody and, ironically, likely would have been close to or  
2 met the Wednesday deadline. Then there were other  
3 circumstances.

4 We did not do a good job communicating with local  
5 counsel, we acknowledge that, but we tried to rectify it as  
6 soon as possible. Again, we've learned our lesson in how to do  
7 that --

8 THE COURT: When did you try and rectify it?

9 MS. SWIZE: We intended to come to court on Friday  
10 morning to address the issue, and then on Monday --

11 THE COURT: And why is that as soon as possible? You  
12 filed it at 2 o'clock on Thursday afternoon and you were going  
13 to wait until 10 o'clock Friday morning to rectify it. How is  
14 that as soon as possible?

15 MS. SWIZE: I may have -- yes, I overspoke. But we  
16 did intend to rectify it promptly, if I may amend that.

17 We didn't -- in hindsight, and, you know, if we had  
18 had the benefit of practitioners who come here regularly, would  
19 we have done something different? Absolutely. Do we know --

20 THE COURT: Jones Day comes here regularly.

21 MS. SWIZE: Yes, Your Honor. And I --

22 THE COURT: You know, it is a very big firm. It can  
23 have people doing a number of different tasks at the same time.  
24 Not, I need to go do work on trying to settle this, I can't  
25 work on trying to settle it and prepare an opposition at the

1 same time.

2 The idea that -- and, you know, honestly, I worked in  
3 big law firms.

4 MS. SWIZE: Yes, Your Honor.

5 THE COURT: And I know what goes on in big law firms.  
6 But it's the firm's responsibility to make sure the work gets  
7 done properly. And if the firm assigns cases and doesn't give  
8 the proper instruction and oversight, it's the firm's  
9 responsibility and it's their consequence.

10 And, you know, I'm a little surprised that Jones Day  
11 is taking this tact and trying to point to a single lawyer as  
12 to not making a deadline when it's the firm's responsibility to  
13 make sure and the partners in that law firm to make sure that  
14 they are adequately supervising the people who work at that law  
15 firm.

16 MS. SWIZE: Your Honor, I appreciate you mentioning  
17 that because I want to be very clear. We are not trying to put  
18 this on the shoulders of any one lawyer, and certainly not an  
19 associate. I am here as a representative of the firm, and we  
20 take full responsibility.

21 We should have been, particularly with individuals  
22 who practice in that court, we should have been, just as much  
23 as Troutman, if not more, informing our associates, there are  
24 special rules in this court, there are special procedures.  
25 Yes, it's a fast pace, yes, you want to get your discovery



1 handled outside of court, but you have to abide by the  
2 deadlines and don't fall into a trap of not knowing and making  
3 assumptions.

4 THE COURT: Okay.

5 MS. SWIZE: Absolutely. And it is our responsibility  
6 as a firm, and all of the partners who practice in this court,  
7 and just in the partnership in general. We have learned  
8 lessons.

9 What I would like to emphasis is that we do practice  
10 here regularly. And again, that doesn't at all excuse that we  
11 didn't use that knowledge in this case. But we do come -- we  
12 are -- you know, we do strive for perfection. We clearly did  
13 not meet it here, but we work very hard and respect the court's  
14 rules. And in the other cases we are representing our clients  
15 and we value the opportunity to do that.

16 This was an aberration, but it was an aberration, and  
17 we own it, and we are very sorry. We sincerely regret it. And  
18 we have looked at it, investigated it, understood where there  
19 was a lack of communication, where there were assumptions on  
20 both sides when people were speaking with each other, excuse  
21 me, with each other. Where there was a lack of supervision.  
22 And that is our responsibility. That is nothing on the client.  
23 That is our responsibility as the partnership, as the  
24 supervision. So I do want that to be very clear.

25 I do want to explain the particular circumstances

1 just so we have the correct factual record, but in no way was I  
2 attempting to point blame to anyone other than the firm and our  
3 role.

4 THE COURT: Okay. Go ahead. The question was  
5 really, how does this constitute excusable neglect? Assuming  
6 that that would be a standard that should apply when there has  
7 been a violation of a Court order.

8 MS. SWIZE: Your Honor, I think this case really does  
9 come down to the reason. Because there has been no -- the  
10 one-day delay, we had the hearing. Granted, there was not  
11 argument on the merits, but the plaintiff hasn't made an  
12 argument and agrees that there wasn't an impact. The date for  
13 discovery production is still in the future. The date for  
14 discovery to close is still in the future.

15 For the same reasons, there was no prejudice to the  
16 plaintiff. Likewise, we did act in good faith. And plaintiff  
17 also acknowledges that we were acting in good faith trying to  
18 handle this case, represent these particular issues.

19 And as in many cases then, the most important point  
20 can be the reason for the delay. And that's where I think in  
21 context, understanding that we were attentive to the case, we  
22 were trying to resolve this, we were also working on the  
23 opposition -- we intended to file at a time that would have  
24 been useful to the Court and useful to the plaintiff to get our  
25 opposition on Wednesday.

1           We then had the snow storm and didn't have the right  
2 understanding that that was too late to then file Thursday --

3           THE COURT: Well, the snow storm wasn't Wednesday.  
4 The snow storm here wasn't on Wednesday. The snow storm was on  
5 Thursday.

6           MS. SWIZE: Right. And I am sorry, I'm referring to  
7 the snow storm in Dallas. We work out of our offices, work at  
8 home. This is really -- but the client, the declarant was not  
9 in a opposition to complete and finalize her declaration on  
10 Wednesday because of the snow storm. And she let us know that.  
11 And again, we should have then contacted the other side,  
12 contacted the Court.

13           But my point is that we endeavored to file in a  
14 timely manner. We were a day late.

15           The plaintiff has not pointed to a case where a  
16 one-day delay is the sort of delay in the circumstances that  
17 would warrant not being permitted to have our motion -- our  
18 opposition considered so that you can consider the motion to  
19 reconsider on the merits.

20           And at the same time, this is such a significant  
21 issue for the client, we certainly were in no way intending not  
22 to address it. In fact, we were doing everything we could both  
23 through compromise efforts or alternative resolutions and in  
24 filing the opposition.

25           The cases that don't find excusable neglect are cases

1 where there really is some sort of misconduct or intentional  
2 delay. There was a case where the party just decided it wasn't  
3 going to answer because it didn't disagree. Or a party glibly  
4 said, I'm not good at math.

5 Our lawyer was trying hard --

6 THE COURT: No, no. You've got cases where people  
7 have used the mail, and it took the mail a long time to get  
8 something delivered, or longer than one would have anticipated,  
9 and there was no follow-through on that.

10 You've got someone who used a calendaring system.  
11 And the Fourth Circuit reversed that, finding it was an abuse  
12 of discretion to find that that was excusable neglect, use a  
13 calendaring system and to miss a deadline by, I believe that  
14 was one day.

15 So the idea that there is -- there is no authority to  
16 support enforcing a Court rule or order because it was only a  
17 day late, I don't think bears scrutiny.

18 MS. SWIZE: On the mail case, there was a prior  
19 incident in that case where the individual had tried to mail  
20 something and it didn't take three days, it took longer than  
21 that. And the Court noted that in finding that there wasn't  
22 excusable neglect.

23 In other words, there was some prior incident to put  
24 that litigant on notice that what they were going to do wasn't  
25 going to work.

1           And in this case, given the history of working with  
2           the other side to try to avoid motions to compel and coming to  
3           the Court, this was the lawyer's first encounter with this sort  
4           of motion, the nondispositive motion, and the fast schedule  
5           that it's on. And so, that is not the same as the mail case.

6           And for the calendaring, again, it was a notice of  
7           appeal. That is a jurisdictional issue.

8           This, respectfully, is an important issue because of  
9           the discovery, the underlying discovery at issue. But in the  
10          full context of promptly taking action the next day and Monday  
11          and admitting responsibility, it was our responsibility to  
12          catch the deadline, and we didn't.

13          THE COURT: Well, isn't it -- and I think maybe I'm  
14          misconstruing part of your argument, is you look at the serious  
15          nature of what the consequences are of missing a deadline when  
16          you look at excusable neglect. And if the Fourth Circuit finds  
17          that you can't appeal a case, which means it is dispositive of  
18          an issue, by using a calendaring system that gives you -- that  
19          puts you one day late, isn't that a much more serious  
20          consequence than having to produce documents in a discovery  
21          dispute?

22          MS. SWIZE: I'm sorry, Your Honor, I'm not sure --

23          THE COURT: So the Symbionics case --

24          MS. SWIZE: Right.

25          THE COURT: -- the one that I'm talking about.

1 MS. SWIZE: Yes.

2 THE COURT: The Court in that case, you know, didn't  
3 say that the time period is -- that it addressed the excusable  
4 neglect argument in the context of that case being one day  
5 late, I think. And the consequence of the Court reversing  
6 Judge Trenga in finding that he abused his discretion in  
7 finding excusable neglect in that case, was that the case could  
8 not be appealed, right?

9 MS. SWIZE: Right, because notices of appeal are  
10 jurisdictional.

11 THE COURT: But there is a time period for getting  
12 excusable neglect. And they filed it within the time period in  
13 which if there was excusable neglect, it could have been filed.  
14 And the consequences of that were much more serious than a  
15 discovery dispute.

16 Do you agree with that?

17 MS. SWIZE: I understand, Your Honor. And I would  
18 again submit that the circumstances of that case are not the  
19 circumstances of our case and the circumstances surrounding  
20 what happened and went wrong.

21 The lawyer in that case used a calendaring system  
22 that he acknowledged he didn't understand. So again, there was  
23 notice that he already had at the time of the error that he  
24 shouldn't have been relying on it.

25 THE COURT: Okay.

1 MS. SWIZE: We cannot get away from the fact that we  
2 as a firm did not comply with the rule. But it wasn't that the  
3 individual lawyer was aware that there was that deadline. And  
4 in the conversations that he was having, with his assumption  
5 that Wednesday would be fine because that was his goal, and  
6 understanding that Wednesday would be fine because it's the  
7 rule, when we passed that deadline, yes, we didn't handle it  
8 properly.

9 But this sort of dialog that was going on with -- now  
10 in hindsight we understand where the confusion was and why  
11 things went awry, but there was an intent to follow a  
12 reasonable time, which would have been Wednesday. He wasn't on  
13 notice and then decided to not follow it or not check into it.

14 I understand, Your Honor, that as a firm we have a  
15 responsibility in every case to follow every rule. And so, any  
16 exception --

17 THE COURT: And every order --

18 MS. SWIZE: And every order.

19 THE COURT: -- of the Court.

20 MS. SWIZE: Absolutely, Your Honor. Any deviation  
21 from that is not acceptable. Mistakes do happen. In the  
22 circumstances of this case where there was effort to comply,  
23 where there was this independent sense of I need to file  
24 something in a timely manner so the other side has it and the  
25 Court has it -- unfortunately, we ran into issues getting it

1 done on time. And our intent to come to court and take full  
2 responsibility for that, in a circumstance where the lawyer  
3 didn't have experience with this sort of situation, and we  
4 weren't communicating well to make sure that he knew and that  
5 we understood the deadline, and it was a one-day delay that  
6 hasn't prejudiced the other side, that the standard for neglect  
7 inherently recognizes there has been some neglect, and so in  
8 order to allow for mistakes to be understood in their context,  
9 there is the standard that you look at the circumstances, and  
10 it's an equitable determination.

11 And we would submit that the circumstances of this  
12 case satisfy that. But also recognizing that we -- it was  
13 within our control and it was within the control of the  
14 partnership to know this deadline. And we have certainly  
15 learned ways that we will change how we handle these cases and  
16 other cases.

17 THE COURT: Anything else on the motion for  
18 reconsideration?

19 MS. SWIZE: No, Your Honor, not unless you have any  
20 further questions.

21 THE COURT: No. All right. Well, you know, I've  
22 reviewed the pleadings. I was involved in this hearing last  
23 week. I think I've made my -- many of my thoughts known during  
24 the discussions and the colloquy I have had with counsel.

25 But this is a case in which there was a Court order



1 that was entered that set a schedule. I think I am bound to  
2 have a need for lawyers, law firms, and parties to comply with  
3 Court orders. And, you know, the idea that I cannot be aware  
4 of a Court order, or I can ignore a Court order, or I can pick  
5 my own deadlines, isn't really acceptable in this court.

6 This Court entered the Rule 16 order. It was entered  
7 in this case in the normal course of business. It has a very  
8 standard procedure in it that Jones Day and Experian is very  
9 aware of, as is Troutman. So the lawyers involved in this case  
10 know what that -- the law firms involved in this case certainly  
11 know what the deadlines were.

12 The idea that we were trying to work out some dispute  
13 is commendable, but it isn't excusable for not filing a timely  
14 opposition in this case.

15 And, you know, I said last week that you would have  
16 to show good cause in order to have me reconsider this  
17 decision. And there is no good cause in this case. There was  
18 a mistake that was made, and consequences come about when  
19 mistakes are made.

20 And, you know, the opposition -- if -- the way in  
21 which this was handled in filing the opposition at 2 o'clock  
22 and then saying, well, we'll just take care of it the next day  
23 if the issue really comes up, you know, is really, really hard  
24 for anyone on the bench to understand that a lawyer would take  
25 that position or that a law firm would take that position.

1 We'll just go ahead and file it and we'll try and deal with the  
2 issue later. Not even drop a footnote. Not take the next, you  
3 know, half an hour to prepare a, you know, motion for leave to  
4 file a pleading late. Just filing it and deciding, we'll take  
5 our chances the next morning, is inappropriate.

6 I am not going to reconsider my decision. I think my  
7 decision was proper at the time. I think the record that is  
8 now before me reinforces that decision even more. That a  
9 mistake was made. The mistake was not excusable. The mistake  
10 was one that could have easily been rectified with proper  
11 supervision, with proper looking at the docket. The docket was  
12 clear. With proper communication.

13 And so, I don't find that this is an appropriate case  
14 for me to reconsider my earlier decision. So my earlier  
15 decision, at least in the context of the motion to compel, is  
16 going to stand.

17 Are you going to argue the stay issue? Who is going  
18 to argue the stay issue?

19 MS. SWIZE: I have that as well, Your Honor.

20 My understanding is that we are in a position to  
21 produce documents. We've been working to respond to the  
22 Court's order in the event it stands. And so that deadline is  
23 on Tuesday, and we are in a position to make a production.

24 There is some question about the scope of what  
25 plaintiff is seeking, and so we can consult with plaintiff

1 about that.

2 The other issue is if we were to file any objections  
3 from the Court's order on this --

4 THE COURT: Right.

5 MS. SWIZE: Then, you know, just given the timing,  
6 it's going to be out of sequence if we've already disclosed  
7 these materials, which are highly sensitive. Very few people  
8 at Experian have access to them. And it is very important that  
9 they remain confidential and not disclosed if they should not  
10 be.

11 And so, we would ask that the Court consider some  
12 sort of stay to accommodate if we were to file any objections.

13 THE COURT: Okay. What I'm going to is I'm going to  
14 stay the requirement to produce these documents to Monday,  
15 March 23.

16 MS. SWIZE: Okay.

17 THE COURT: If you want to file a request for the  
18 District Judge to reconsider my decision, you're going to need  
19 to do it today and notice it for next Friday. So file it  
20 today. You can notice it for the 20th. Judge O'Grady will  
21 decide it on the 20th. If he reconsiders my decision, then you  
22 won't have to produce the documents. If he doesn't, then you  
23 need to produce them on March 23.

24 MS. SWIZE: Thank you, Your Honor.

25 THE COURT: Okay. So that will give you that

1 opportunity. And one of the reasons I'm putting that tight  
2 timetable is there is an April 10 discovery cutoff date, and  
3 Judge O'Grady isn't hearing motions the following Friday. So  
4 it really needs to get done next Friday.

5 So if you want to take this argument up to Judge  
6 O'Grady, you need to file it today and notice it for next  
7 Friday at 10 o'clock.

8 Okay?

9 MS. SWIZE: Thank you, Your Honor.

10 THE COURT: Ms. Kelly, anything you need to add to  
11 the record?

12 MS. KELLY: No, Judge. Thank you.

13 THE COURT: Okay, thank you. All right, I'm going to  
14 take a two-minute recess, and then I will take up the  
15 11 o'clock criminal matter.

16 Thank you.

17 NOTE: The hearing concluded at 11:03 a.m.

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C E R T I F I C A T E   o f   T R A N S C R I P T I O N

I hereby certify that the foregoing is a true and accurate transcript that was typed by me from the recording provided by the court. Any errors or omissions are due to the inability of the undersigned to hear or understand said recording.

Further, that I am neither counsel for, related to, nor employed by any of the parties to the above-styled action, and that I am not financially or otherwise interested in the outcome of the above-styled action.

/s/ Norman B. Linnell

Norman B. Linnell

Court Reporter - USDC/EDVA